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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-1794

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

MANUEL FLORES-MONTANO,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 United States Code §3006A(d)(6) and Rule 39 of this Court, Respondent, Manuel Flores-Montano, asks leave to file the attached Brief in Opposition to the United States' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18 United States Code §3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: 10 September 2003

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

MANUEL FLORES-MONTANO,

RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION
TO UNITED STATES' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.

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IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR RESPONDENT IN OPPOSITION TO
UNITED STATES' PETITION FOR WRIT OF CERTIORARI

Respondent Manuel Flores-Montano respectfully requests that the Court deny the Solicitor General's petition for a writ of certiorari filed on behalf of the United States.

OPINION BELOW

The order of the United States Court of Appeals for the Ninth Circuit is unreported. The order of the district court is unreported.

JURISDICTION

On March 14, 2003, the Ninth Circuit entered its judgment. United States' Petition for a Writ of Certiorari (Pet.), App. at 1a. The government has invoked the Court's jurisdiction under 28

U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

STATEMENT OF THE CASE

A. Facts

1. The Search of Respondent's Vehicle Was Not Routine; Contract Mechanics Completely Dismantled the Gas Tank of the Vehicle Driven by Respondent.

On February 12, 2002, Respondent attempted to enter the United States at the Otay Mesa Port of Entry as the driver of a 1987 Ford Taurus station wagon. Pet., App. at 7a. Respondent was ordered out of the vehicle and taken to the security office. Pet. at 3. Customs inspectors drove the car to the secondary inspection area for a thorough inspection. Id.

After a narcotics detector dog alerted to the station wagon, customs inspectors decided to search the gas tank. Pet., App. at 4a, 7a. Recognizing that the removal and disassembly of a fuel tank creates significant risks to an operator of a motor vehicle, the Customs Service has adopted a policy requiring that every gas tank removal/disassembly be performed by an off-site contract mechanic from the private sector. Pet. at 15. Accordingly, the

inspectors called a contract mechanic to come to the port of entry. Pet., App. at 7a. After a delay of approximately 20 to 30 minutes, the mechanic arrived. Id. Inspector Pesayco took the car to a hydraulic lift where the mechanic elevated it. Id.

The actual removal of the gas tank involved several different operations by the government's contract mechanic, all performed in a manner similar to the disassembly detailed in the Ninth Circuit's decision in United States v. Molina-Tarazon, 279 F.3d 709 (9th Cir. 2002). See Pet., App. at 8a-9a.

> The mechanic hoisted the [vehicle] onto a lift, loosened the straps holding the tank to the chassis, disconnected the filler and the sending hoses, detached electrical connections, disengaged the fill neck and unscrewed the bolts. He then detached the tank itself by unscrewing the pump unit and removing the "bushing" which held the tank to the [vehicle]. All of those actions required the use of force... .

Molina-Tarazon, 279 F.3d at 714. It took approximately ten to fifteen minutes for the mechanic successfully to lower the gas tank on a second, portable lift. Pet., App. at 8a. He did not reassemble the vehicle.

After the contract mechanic lowered the tank, Customs Inspector Pesayco noticed bondo on top of it. See Pet., App. at 8a. The inspector hammered off the bondo, which revealed an access plate underneath. Id. The inspector's hammering scratched and "possibly slightly dented" the tank. Id. The

bondo was destroyed. Id. The inspector then opened the access plate and found cellophane wrapped packages containing marijuana inside. Id. Customs inspectors discovered 37 kilograms of marijuana (including the weight of the packaging) in the tank. Id. It took Inspector Pesayco roughly five to ten minutes to hammer away the bondo and remove the access plate. Id.

2. The Declarations Submitted by the Government Below Did Not Establish That the Search Conducted Here Was Routine.

In an effort to re-characterize its use of contract mechanics to dismantle a vehicle as "routine," the government submitted several declarations to the district court. For instance, Jayson P. Ahern, Director, Field Operations, for the Southern District of California Customs Management Center, reports that close to 25% of all drug seizures at the Southern California ports of entry have been gas tank seizures. Pet. App. 11a-12a.[1] Although Director Ahern states that "searches" of gas tanks are "routine," he does not claim that disassembly of fuel systems is "routine." Id. at 12a. Similarly, although he believes it is "very important that Customs continues to have the ability to conduct random and suspicionless searches for drugs in gas tanks and other compartments at the border," id., he does not

[1] Director Ahern does not discuss the remaining 75% of seizures

claim that Customs conducts "random and suspicionless" disassembly of gas tanks.

Director Ahern speculates that "[r]equiring reasonable suspicion for compartment searches involving necessary damaging force would result in an increase in compartment smuggling of drugs, contraband, and other dangerous materials." Id. at 13a. Director Ahern does not support his *ipse dixit* with any statistics or other evidence, even though federal courts in other border districts have ruled that such searches are nonroutine searches requiring reasonable suspicion for at least 15 years. See, e.g., United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998); United States v. Carreon, 872 F.2d 1436, 1440-42 (10th Cir. 1989).

The Declaration of Diane Hinckley, Assistant Director for Inspections, Immigration and Naturalization Service ("INS"), San Diego District, is to the same effect. Assistant Director Hinckley reports that gas tanks are used for smuggling undocumented aliens into the United States, and that the use of such smuggling techniques is "not uncommon." Pet., App. 15a-16a.

Like Director Ahern, Assistant Director Hinckley claims that "inspectors often search gas tank compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles." Id. at 16a. But, also like Director Ahern, she makes

no claim that inspectors routinely dismantle gas tanks as part of these efforts. Assistant Director Hinckley also offered her opinion -- unsupported by any statistics -- that "[r]equiring reasonable suspicion to search gas tank compartment areas and other compartments could lead to gas tank compartments and other compartments becoming the preferred choice for alien smuggling in the Southern District of California." Id. at 16a-17a. She offers no evidence that these smuggling techniques have "becom[e] the preferred choice for alien smuggling" in those districts that have recognized the reasonable suspicion requirement for nonroutine searches for several years.

B. Proceedings Below

On February 27, 2002, the grand jury for the Southern District of California returned a two-count indictment alleging that Respondent imported approximately 37 kilograms of marijuana in violation of 21 U.S.C. §§ 952 and 960 and possessed with intent to distribute approximately 37 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1).

On June 7, 2002, Respondent filed a motion to suppress the fruits of the nonroutine border search of the station wagon he was driving. On June 20, 2002, the district court entered an order suppressing the evidence seized from the vehicle. See Pet., App. at 16a-17a. Relying upon Molina-Tarazon, 279 F.3d

709, the district court held that the search of the fuel tank was a nonroutine search requiring reasonable suspicion and that the government had both declined to establish reasonable suspicion and "waived its right to rely on the alternative basis of reasonable suspicion." Pet., App. at 16a-17a.

On June 20, 2002, the government filed a Notice of Appeal to the Ninth Circuit. On July 26, 2002, the government petitioned the Ninth Circuit Court of Appeal to convene an en banc panel for the purpose of reconsidering Molina-Tarazon. On March 14, 2003, the Court of Appeal issued a summary affirmance of the district court's judgment, stating that "[a] review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument." Pet., App. at 1a. The petition for en banc review was denied without written order. Pet. at 5 n.2.

REASONS FOR DENYING THE PETITION

In United States v. Montoya De Hernandez, 473 U.S. 531, 541 (1985), the Court held that the detention of a traveler at the border "beyond the scope of a routine customs search and inspection," must be supported by reasonable suspicion. Since this seminal decision, every Circuit that has addressed the "nonroutine border search doctrine" in the context of searches of property has held that certain searches of inanimate objects are nonroutine, and that such searches must be supported by reasonable suspicion. In Molina-Tarazon, 279 F.2d 709, the decision upon which the panel in the instant case relied, the Ninth Circuit Court of Appeal adopted this long-held, unanimous view.

The Solicitor General now petitions for a writ of certiorari, arguing that the Ninth Circuit Court of Appeal erred in applying the nonroutine border search doctrine to the search of an inanimate object, Pet. at 12-13, or, in the alternative, that even if the search was nonroutine, it nonetheless need not be supported by reasonable suspicion. Pet. at 15-16. These positions are contrary to the holdings of every Circuit court that has addressed these issues.

As a matter of public policy, the government also now contends that the Court of Appeal's decision "threatens to impair

the government's ability to protect the border." Pet. at 17. The Solicitor General's claim is not supported by the record. First, the evidence offered below does not demonstrate that the constitutional requirement that a nonroutine search be supported by reasonable suspicion in any way compromises the ability of the Customs and Immigration services to protect the Nation's borders. None of the evidence offered below demonstrates that either the Customs Service or the INS employ policies of conducting the sort of intrusive search undertaken in the instant case -- involving disassembly of a gas tank -- on a random basis. In short, there is no evidence that the day to day practices of these agencies have in any significant way been disturbed by the modest requirement of reasonable suspicion imposed by Molina-Tarazon.

Perhaps more importantly, none of the evidence offered below demonstrates that the missions of the Customs Service or the INS have in any way been compromised in those Circuits that applied the nonroutine search doctrine to inanimate objects prior to the Ninth Circuit's decision in Molina-Tarazon. In fact, the applicability of the nonroutine search doctrine to personal property was recognized at least 15 years ago in the Tenth Circuit, and at least 5 years ago in the Fifth Circuit. Although these two Circuits contain ports of entry that are at least as busy as those in Southern California, the government offered no

evidence at all of negative consequences in those Circuits.

Because there is no disagreement among the Circuit Courts of Appeal, nor has an important federal question been decided in a way that conflicts with relevant decisions of this Court, (see Rule 10 of the Rules of the Supreme Court of the United States) the petition for a writ of certiorari should be denied.

A. Every Circuit Court of Appeal that has Addressed the Issue Agrees that the Nonroutine Border Search Doctrine Applies to Searches and Seizures of Inanimate Objects, Including Vehicles.

By applying the nonroutine search doctrine to disassembly of a vehicle's gas tank, see Molina-Tarazon, 279 F.3d at 713-17, the Ninth Circuit joined at least three other Circuits that have recognized that certain intrusive searches of personal property are not routine. In fact, every Circuit to address the issue of whether a search of personal property can be nonroutine has held that the nonroutine border search doctrine does apply to searches of inanimate objects and that such nonroutine searches must be supported by reasonable suspicion. See Rivas, 157 F.3d at 367-68 (suppressing evidence where nonroutine search involving the drilling of a hole in a camper shell was not supported by reasonable suspicion); United States v. Robles, 45 F.3d 1, 5 (1st Cir. 1995) ("*The government concedes* that drilling a hole in the cylinder was nonroutine")(emphasis added); Carreon, 872 F.2d at

1441-42 (drilling small hole in camper shell was nonroutine search justified by reasonable suspicion).[2] Thus, the Ninth Circuit's application of the nonroutine search doctrine to certain highly intrusive searches of personal property enjoys unanimous support.

The Solicitor General's petition completely overlooks that support. Instead, he focuses on the Court's recognition of the border search exception to the probable cause requirement and the various statutes that have authorized border searches. Pet. at 6-12. While it certainly is true that the border search doctrine gives officials wide latitude to conduct searches at the border, see, e.g., United States v. Ramsey, 431 U.S. 606, 616 (1977), the Court has been careful to describe that authority as applicable to "routine" searches. Thus, in Montoya de Hernandez, the Court observed that "*[r]outine* searches of the persons and effects of entrants are not subject to any requirement of

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[2] Although the Solictor General cites United States v. Nieves, 609 F.2d 642 (2d Cir. 1979), see Pet. at 12, Nieves is not inconsistent with Molina-Tarazon, Rivas, Robles and Carreon. Rather, defendant Nieves argued only that the "search of his *person* went beyond a routine border search." 609 F.2d at 645 (emphasis added). Specifically, Nieves contended that the removal and search of his shoes was a "strip search," subject to the "reasonable suspicion standard." Id. at 645-46. Because Nieves did not raise the issue of the applicability of the nonroutine search doctrine to personal property, the Nieves Court did not consider whether the drilling of holes in Nieves' shoes was a destructive, and therefore nonroutine, search.

reasonable suspicion, probable cause, or warrant.' 473 U.S. at 538 (citation, footnote omitted; emphasis added). Ramsey similarly characterizes the border search doctrine: "It was 'without doubt' that the power to exclude aliens 'can be effectuated by *routine* inspections and searches of individuals or conveyances seeking to cross our borders.'" 431 U.S. at 619 (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973)) (emphasis added).

Thus, the Court has consistently described the authority to conduct suspicionless border searches as an incident to a "routine" border inspection. Indeed, in Montoya de Hernandez, the Court explicitly found that the search conducted in that case was not routine, and required reasonable suspicion. 473 U.S. at 541; accord Molina-Tarazon, 279 F.3d at 712 ("[i]n order to conduct a search that goes beyond the routine, an inspector must have reasonable suspicion that the person to be searched may be carrying contraband") (citation omitted). The reasonable suspicion standard, the Court held, "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause." Id. Although Montoya de Hernandez does not address nonroutine searches of personal property, it does make clear that the constitutional and statutory authority to conduct

suspicionless border searches is not without limitation. See id.

In short, the Ninth Circuit's decision is entirely consistent with the holdings of at least three other Circuits and does not conflict with any decision of the Court. There is no contrary authority. Moreover, Montoya de Hernandez's recognition that the authority to perform suspicionless searches does not extend to nonroutine searches undermines the Solicitor General's proposed absolutist view of the border search doctrine.

B. The Court of Appeal Properly Held that the Disassembly and Removal of a Vehicle's Fuel Tank is a Nonroutine Search Requiring Reasonable Suspicion.

1. The Court of Appeals Properly Applied the Nonroutine Border Search Doctrine to this Particularly Invasive Type of Vehicle Search.

Just as the First, Fifth and Tenth Circuits correctly concluded that the highly intrusive searches of personal property in Robles, Rivas and Carreon were nonroutine, the Ninth Circuit properly characterized the disassembly of a vehicle gas tank and fuel system as nonroutine. As a threshold matter, the Solicitor General mischaracterizes the Molina-Tarazon opinion when he suggests that the Ninth Circuit "erred by failing to give any weight to the government's interest in securing the border by conducting suspicionless searches." Pet. at 14; see also id. at 16. On the contrary, the Ninth Circuit cites the Court's cases explicating the border search doctrine as well as the same

statutory authority upon which the Solicitor General relies. See Molina-Tarazon, 279 F.3d at 712 (citing Montoya de Hernandez, 473 U.S. 531; Ramsey, 431 U.S. 606; Carroll v. United States, 267 U.S. 132 (1925); and 19 U.S.C. § 1581(a)).

In fact, Molina-Tarazon expressly considered the governmental interests at stake. Noting that the border search was authorized by the same Congress that proposed the Fourth Amendment, Molina-Tarazon observed that the "border search has a long history of judicial and public acceptance." Id. The Ninth Circuit also recognized that "routine searches of persons and their effects entering the country may be conducted without any suspicion whatsoever." Id. (citing Montoya de Hernandez, 473 U.S. at 537-38). The Ninth Circuit's reliance on these authorities makes clear that it was aware of the government's strong interest in policing the border.

Nonetheless, even "border searches are not exempt from the irreducible constitutional requirement of reasonableness." Id. Particularly disconcerting to the Molina-Tarazon court was the government's position that "the border search authority gives the government the right to dismantle a car with no reasonable suspicion whatsoever." Id. at 713.[3]

[3] Because the Solicitor General has taken the position that the nonroutine border search doctrine should be limited to highly intrusive searches of the person, Pet. at 12-13, the government's

> Were we to accept this argument, it would mean that customs agents at the border could, acting on no suspicion, order a car disassembled down to the last o-ring, and hand it back to the owner in a large box. We think not. We hold, rather, that some searches of inanimate objects can be so intrusive as to be considered nonroutine.

Id.; accord Rivas, 157 F.3d at 367-68; Robles, 45 F.3d at 5; Carreon, 872 F.2d at 1442.[4]

2. The Facts of this Case Demonstrate that the Disassembly and Removal of Respondent's Fuel Tank was a Nonroutine Search.

The disassembly and removal of a fuel tank is a labor intensive, highly intrusive and potentially lengthy procedure that requires specialized labor, skills and tools, and the application of force upon a vital component of an automobile. See Pet. at 15 (it is the policy of the Customs Service to contract with mechanics to perform this duty, rather than to use its own employees). While the Solicitor General asserts that fuel tank searches are "quick and safe," Pet. at 15, and points out that the "*actual disassembly* of Respondent's gas tank took

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position in the instant case is identical to the position it took in Molina-Tarazon.

[4] Because the Court of Appeal's decision is the application of a properly stated existing rule of law and there is no inter-circuit conflict, this issue is not appropriate for the issuance of a writ of *certiorari*. See Rule 10 of the Rules of the Supreme Court of the United States ("A petition for a writ of certiorari will be granted only for compelling reasons" and will rarely be granted even when the asserted error consists of the "misapplication of a properly stated rule of law.").

only five to ten minutes." Pet. at 13, this characterization belies the highly intrusive nature of the procedure.

In this case, it took 20 to 30 minutes for the contract mechanic to arrive after he was called. See Pet., App. at 7a. The actual removal of the tank required the use of two hydraulic lifts (one to elevate the car and the other to lower the tank), and the application of force and special tools to disconnect hoses and electrical connections. Id. The disassembly of the tank took roughly ten to fifteen minutes. Id.

It then took the Customs inspector another five to ten minutes to hammer off the bondo on top of the tank and to remove the access plate. Id. at 8a. In total, roughly 35 to 55 minutes had elapsed between the time that the contract mechanic was contacted until the gas tank was opened. The record is silent as to how much time would have been required to re-connect the gas tank had no contraband been discovered. See Pet. at 13a. The need for the use of specialized labor, as well as the actual delay here and the potential for even greater delay, strongly suggest that the search was nonroutine.

Moreover, the factor analysis employed by the Ninth Circuit strongly supports its conclusion that the search was nonroutine. First, it relied on the fact that force was used to disassemble the gas tank. See Molina-Tarazon, 279 F.3d at 709 ("[These]

actions required the use of force and in their totality they raise the inference that this was not a routine search."). The use of force was also critical to the reasoning of the other Circuits that have applied the nonroutine search doctrine to searches of personal property. See, e.g., Rivas, 157 F.3d at 367 (agreeing with the First Circuit's conclusion that "'drilling into a closed, metal cylinder was not a routine search because force was used to effect the search,'" and concluding that "drilling into Rivas' trailer was a nonroutine search") (quoting Robles, 45 F.3d at 5).

The danger to the driver and passengers of the automobile, as well as the fear occasioned by the disassembly of the gas tank, are additional factors supporting the Ninth Circuit's determination that the search in Molina-Tarazon was nonroutine. 279 F.3d at 714-17. The Ninth Circuit supported its conclusion that a gas tank disassembly raises issues of danger with its common sense observation that "[a]n error in removing, disassembling and then reassembling the portion of a motor vehicle that contains a highly flammable and potentially explosive substance like gasoline might well result in disastrous consequences for the vehicle's owner." Id. at 715. The danger resulting from an accident involving a vehicle's fuel system is hardly "entirely speculative," as the Solicitor General suggests.

See Pet. at 15.[5] The possibility that a "fuel leak [could] cause[] a fire or explosion," Molina-Tarazon, 279 F.3d at 715, is a "point [that does not] require[] much documentation." Id. at 715 n.7.

Molina-Tarazon also took into account "whether the search is psychologically intrusive." Id. at 715-17. Citing several of the Court's cases emphasizing the fear engendered by law enforcement intrusions, the Ninth Circuit "conclude[d] that the search conducted here would make a reasonable driver -- one aware that a mechanic working for the government dismantled and reassembled a component critical to his vehicle's safe operation -- apprehensive about getting back into his vehicle and continuing on his way." Id. at 716. The Solicitor General dismisses such fears as "unreasonable" because they are not based on "empirical" evidence. Pet. at 15. Again, the danger associated with highly flammable gasoline can hardly be gainsaid. And not every motorist will blindly trust a mechanic that he or she did not choose, see Molina-Tarazon, 279 F.3d at 716, and whose work "leaves the normal driver unable to confirm whether

[5] The searches conducted in Rivas, Robles, and Carreon do not involve the sort of danger created by the disassembly of Respondent's fuel system. Therefore, the argument that the instant search is nonroutine is arguably stronger than the arguments accepted by the First, Fifth and Tenth Circuits.

everything is restored to its original state." Id. at 717.[6]

C. The Court of Appeal's Decision Does Not Threaten the Government's Ability to Police the Nation's Borders.

In addition to his assertion that the Ninth Circuit failed to consider the government's interests in random, suspicionless disassembly of gas tanks, the Solicitor General also provides a separate contention that the Ninth Circuit's decisions in Molina-Tarazon and the instant case will make it impossible for Customs and INS officials effectively to interdict drug and alien smuggling along the border. The inability of Customs and INS officials to conduct random searches of fuel tanks, reasons the Solicitor General, would compromise the security of the western United States by encouraging the increased use of gas tanks by drug and alien smugglers as well as by engendering a heightened risk of a terrorist attack. Pet. at 17-20.

The record does not support the Solicitor General's arguments. While the petition claims that Molina-Tarazon "deprives Customs officials of an essential tool to protect against the smuggling of drugs, persons, weapons, and other contraband," Pet. at 6, and that "[t]he authority to search gas

[6] In its discussion of the disadvantages of roving Border Patrol stops compared to fixed checkpoints, the Court noted that roving patrols were more likely to "frighten motorists," United States v. Ortiz, 422 U.S. 891, 894-95 (1975), but did not assert that it was reasonable for them to be frightened.

tanks without any level of suspicion is critical to the government's ability to deter and detect smuggling," id., the declarations submitted below do not bear out these claims.

To be sure, the declarations do reflect that Customs and INS officials would like to have the authority to conduct suspicionless disassemblies of gas tanks. See, e.g., Pet., App. at 12a (declaration of Director Ahern of the Customs Service). But far from establishing that such searches are "critical" or "an essential tool" of the Customs Service, Director Ahern fails to provide any evidence that Customs and Immigration inspectors conduct random and suspicionless fuel tank disassemblies and removals. See id. at 11a-13a. Nor does the declaration of Assistant Director Hinckley establish that INS has a policy of randomly undertaking the time consuming and labor intensive process of disassembling and removing a fuel tank. See id. at 15a-17a.

While the declaration of Assistant Director Hinckley states that "*inspectors often search* gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles," id. at 16a (emphasis added)), this declaration only says that inspectors conduct random searches. It does not say that those routine or random searches involve the disassembly and removal of fuel tanks and

makes no mention of the contract mechanics that are required under the government's own policies to perform this procedure.

While customs inspectors may conduct routine examinations or searches of fuel tanks without any level of suspicion, these examinations likely consist of narcotics detector dog screens, gas tank tapping, visual inspections and fiber optic scopes. See, e.g., Pet., App. at 4a (Declaration of Visente Garcia) (gas tank tap and dog alert before removal of tank in the instant case); Molina-Tarazon, 279 F.3d at 711-12 (dog screen, visual inspection and attempted use of fiber optic scope before removal of gas tank); United States v. Cedano-Arellano, 332 F.3d 568, 572 (9th Cir. 2003)(dog alert and gas tank tap before removal of tank). No evidence in the record suggests otherwise.

Similarly, there is no evidence before the Court that the disassembly and removal of a gas tank is the only practicable means of determining whether the tank contains contraband. The Solicitor General goes no further than to say that the "process [of removing the gas tank] *may* be the only practicable alternative for the government to determine whether the gas tank has been modified or altered." Pet. at 12 (citing Molina-Tarazon, 279 F.3d at 712 & nn. 2-3) (emphasis added). The declarations simply do not speak to which alternatives are practicable. Indeed, they do not establish that a gas tank

disassembly is ever the only practicable alternative.

Both Director Ahern and Assistant Director Hinckley speculate that the Ninth Circuit's decision in Molina-Tarazon will lead to an increase in the use of gas tanks in smuggling efforts and a decrease in the effectiveness of the efforts of Customs and INS to combat these activities. Pet., App. at 13a, 16a-17a. Their assertions are not supported by any evidence, statistical or otherwise.

This shortcoming is significant because of the decisions in Rivas and Carreon. In Rivas, the Fifth Circuit applied the nonroutine border search doctrine to a search of personal property: the inspector drilled into Rivas' camper. See 157 F.3d at 367. Thus, for over 5 years it has been the law of the Fifth Circuit -- which contains some of the nation's busiest ports of entry -- that reasonable suspicion must be established to support certain searches of personal property. Yet the government offered no evidence regarding the effect of the Rivas decision on the operations of the Customs Service and the INS in the Fifth Circuit.

Similarly, the Tenth Circuit, which also contains a border state, interpreted Montoya de Hernandez to "require[] a "particularized and objective basis" for a finding of "reasonable suspicion" to justify a nonroutine search in which an inspector

drilled into a camper wall. Carreon, 872 F.2d at 1443. Carreon was decided 15 years ago. Yet the government offered no evidence regarding the effect of the Carreon decision on the operations of the Customs Service and the INS in the Tenth Circuit. In short, if the government's ability to protect the border actually was significantly impaired by the recognition that the nonroutine search doctrine also applied to searches of personal property, then the government would have offered such evidence below. Its failure to do so suggests that the speculation offered in the declarations of Director Ahern and Assistant Director Hinckley do not merit the Court's review of the instant case.

Finally, the Solicitor General cites the apprehension of a would be terrorist who planned to detonate explosives at LAX airport as a basis for taking a narrow view of the Fourth Amendment rights of citizens entering this country. Pet. at 19. While Respondent certainly concedes that terrorist activity represents a grave threat to the Nation, no evidence offered below supports the view that the Ninth Circuit's decisions in Molina-Tarazon and the instant case, or the decisions in Rivas, Robles and Carreon, in any way circumscribe the Nation's ability to defend itself. Indeed, the declarations filed below do not even make this claim. The Solicitor General's invocation of the threat of terrorism is utterly without support on this record.

D. **Every Circuit Court that has Considered the Issue has Held that a Non-Routine Border Search Must be Supported by Reasonable Suspicion.**

The Solicitor General's fall-back position is that even if the disassembly and removal of the fuel tank from the vehicle Respondent was driving was a nonroutine search, the nonroutine search constitutes only a "minimal intrusion" and need not be supported by reasonable suspicion. See Pet. at 15-16. In advancing this counter-intuitive argument, the Solicitor General relies upon the Court's statement in Montoya De Hernandez that "[b]ecause the issues are not presented today, we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches." 473 U.S. at 541 n.4. Of course, that statement provides the Solicitor General with no support whatsoever; it merely indicates that the Court has not decided the issue. In fact, the Court's recognition that the reasonable suspicion standard "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause," suggests that the reasonable suspicion standard is proper under these circumstances. Id. at 541.

Moreover, application of the reasonable suspicion standard is certainly justified because the intrusion here was

hardly minimal. A vehicle search implicates two Fourth Amendment concerns, privacy interests and property interests. See United States v. Jacobson, 466 U.S. 96, 113 (1984) (The Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in property.").

More importantly, every Circuit court that has considered this issue has followed Montoya de Hernandez and held that if the search is nonroutine, then the applicable standard is reasonable suspicion. Rivas, 157 F.3d at 367 ("A [border] stop and search that is not routine requires a reasonable suspicion of wrongdoing to pass constitutional muster.")(internal quotation marks omitted); Robles, 45 F.3d at 5 ("The rule as to nonroutine border searches is [that] [t]here must be reasonable suspicion before a search can lawfully be conducted."); United States v. Ramos-Saenz, 36 F.3d 59, 61 (9th Cir. 1994)("Although routine border searches may proceed without probable cause or justification, reasonable suspicion is required for the detention of a traveler at the border beyond the scope of a routine customs search and inspection.")(internal quotation marks omitted); United States v.

Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993) "When a border search and seizure becomes nonroutine, a customs official needs reasonable suspicion to justify it." ; Carreon, 872 F.2d at 1440-42 (nonroutine border search justified on the basis of reasonable suspicion); United States v. Oyekan, 786 F.2d 832, 837 (8th Cir. 1986)(joining those circuits holding that a reasonable suspicion is required for strip and involuntary x-ray searches); see also Bradley v. United States, 299 F.3d 197, 203 (3d Cir. 2002)("While we have not had the occasion to address the question left open in Montoya de Hernandez - the level of suspicion, 'if any,' necessary to conduct at least certain types of nonroutine searches - those court of appeals that have done so agree that reasonable suspicion is required.")(internal citations omitted).

The striking unanimity of the Circuit Courts of Appeal on this question is founded upon plain common sense. Simply put, it would be utterly pointless to conduct an inquiry as to whether a border search is routine or nonroutine if no level of suspicion is required in either case. Moreover, the Court has already counseled against creating new Fourth Amendment standards, warning that "subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question." Montoya de Hernandez, 473 U.S. at 541. The many Courts of Appeal have correctly adopted the reasonable suspicion standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Dated: September 10, 2003

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-178

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

MANUEL FLORES-MONTANO,

RESPONDENT.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO | ss:

Margarita Gonzales, being first duly sworn, deposes and says: That pursuant to Rule 29.4(a) of this Court she served the within OPPOSITION TO THE UNITED STATES' PETITION FOR WRIT OF CERTIORARI on the counsel for PETITIONER by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to Theodore B. Olsin, Solicitor General of the United States, Department of Justice Washington, D.C. 20530-0001; and included an original and ten (10) copies to Hon. William K. Suter, Clerk United States Supreme Court, 1 First Street, NE Washington, D.C. 20530 and depositing same in the United States mails at San Diego, California on September 10, 2003.

MARGARITA GONZALES, Affiant

Subscribed and Sworn to before me
this 10th day of September 2003.

FRANCINA FERNANDEZ
COMM # 1361861
NOTARY PUB. CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. JUNE 22 2004

Notary Public in and for said
County and State.